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IN THE

Supreme Court of the United States

October Term, 1972

No. 72-1029

DISTRICT 65, DISTRIBUTIVE WORKERS OF AMERICA,

Petitioner,

against

R & M KAUFMANN, a Division of Russ Togs, Inc.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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The Petitioner, District 65, Distributive Workers of America,* prays that a Writ of Certiorari issue to review the opinions of the United States Court of Appeals for the Seventh Circuit (1) on September 21, 1972, granting the Respondent's petition for review of a National Labor Relations Board order and (2) on October 27, 1972, denying Petitioner's motion for leave to intervene and for leave to file its petition for rehearing.

* Petitioner is the successor to the Union below, then known as District 65, Wholesale, Retail, Office and Processing Union.

Opinions Below

The original opinion of the United States Court of Appeals for the Seventh Circuit is reported at —— F.2d —— and is printed in the Appendix at page 1a. The order denying the petitioner's motion to intervene and petition for rehearing is unreported and is printed in the Appendix at page 8a.

The case originally came to the Court of Appeals on a Petition for Review and a Cross Application for Enforcement of an Order of the National Labor Relations Board. The Decision and Order of the Board is reported at 192 NLRB No. 14 and is printed in the Appendix at page 9a.

The motion by Petitioner for leave to intervene and its petition for rehearing are printed in the Appendix at pages 21a and 24a.

Jurisdiction

The judgment of the Court of Appeals granting the respondent's Petition for Review is dated September 21, 1972 and was entered on that date.

The order denying petitioner's Motion to Intervene and its Petition for Rehearing was entered on October 27, 1972. This petition for certiorari is filed within ninety (90) days of this date.

Jurisdiction to review, by Writ of Certiorari, the judgment of the Court of Appeals is conferred upon this Court by the provisions of 28 U.S.C. 1254(1) and by §10(e) and §10(f) of the National Labor Relations Act, 29 U.S.C. 160(e) and (f).

Questions Presented

I. When the National Labor Relations Board upholds a union's unfair labor practice charge against an employer and, following proceedings before the Board in which the union participated as a party, issues an order directed at the employer requiring it to bargain with the union, does the union have the right to intervene in judicial review proceedings brought by the employer, pursuant to this Court's decision in *UAW* v. *Fafnir Bearing*, 382 U.S. 205, after the Court of Appeals has granted the employer's petition to set aside said order of the Board?

II. When a United States Court of Appeals applies an improper standard of judicial review and substitutes its judgment for that of the National Labor Relations Board, thereby depriving the petitioner of substantial statutory and constitutional rights, should that decision be permitted to stand?

Statutes Involved

Provisions of United States statutes pertinent to this case are as follows:

29 U.S.C. 157. Employees shall have the right * * * to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining * * *

29 U.S.C. 158(a)(5). It shall be an unfair labor practice for an employer * * *

(5) to refuse to bargain collectively with te representatives of his employees, subject to the provisions of section 159(a) of this Title.

29 U.S.C. 159(a). Representatives designated or selected for the purpose of collective bargaining by the majority of employees * * * shall be the exclusive representatives * * * for the purpose of collective bargaining in respect to rates of pay, wages, hours of employment or other conditions of employment.

29 U.S.C. 160(e). The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive.

29 U.S.C. 160(f). Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such a court a written petition praying that the order of the Board be modified or set aside * * * Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (3) of this section, and shall have the same jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board, the findings of the Board with respect to question of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

28 U.S.C. 1254(1). 1. Cases in the courts of appeals may be reviewed by the Supreme Court * * *:

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(1) By writ of certiorari granted upon the petition of any party of any civil case, before or after rendition of judgment or decree.

Statement of the Case

On May 26, 1969, the petitioner Union filed a petition with the National Labor Relations Board seeking an election for representation of a unit of traveling, commission salesmen employed by the respondent Employer. The Employer is engaged in the manufacture and sale of ladies' apparel, with its principal offices and plant located in Aurora, Illinois.

Hearings were held by the Regional Director for the 13th Region of the NLRB in Chicago, Illinois. All parties, including the petitioner were represented at and participated in the hearings, introducing evidence, examining and cross-examining witnesses and presented written and oral arguments.

The respondent, during the hearing, declined to enter into the usual stipulation that the Union was a labor organization within the meaning of Section 2(5) of the National Labor Relations Act. The *sole* reason why the Employer declined to do so in that proceeding was predicated on its belief that the Union was not acting for itself (by bringing the representation proceeding) but in fact was "fronting" for another organization which had been disqualified by the Board from acting as a bargaining agent under the National Labor Relations Act.

The other organization is the National Association of Women's and Children's Apparel Salesmen (NAWCAS).

In a prior case before the Board, District 65 (the petitioner herein) and NAWCAS attempted to file joint petitions for representation in thirty-one (31) cases before the Board. The cases were consolidated and tried on the issue of whether NAWCAS was a labor organization within the meaning of the National Labor Relations Act.

The Board decided in that case, *Bambury Fashions*, 179 NLRB 447, that NAWCAS was a labor organization within the meaning of the Act but that *it* was disqualified because its conflicting interests in the operation of trade shows placed them in competition with employers whose employees they might seek to represent. 179 NLRB at 450.

Prior to the Board's decision in *Bambury*, District 65 *alone* filed the petition for representation on behalf of the traveling salesmen employed by R & M Kaufmann, a division of Russ Togs, Inc., and which resulted in the aforesaid representation hearings before the Board.

The Union argued before the Board (in this case below) that despite its affiliation with NAWCAS, it always continued to exist as a separate labor organization, having its own constitution, officers and organizational structure; that it continuously engaged separately in the representation of employees for collective bargaining and that it *alone* was entitled to be the bargaining representative of the employees involved in the proceeding.

On December 10, 1970, the Board issued its Decision and Direction of Election upholding District 65's contentions. 187 NLRB No. 20. Appendix at page 33a. In directing an

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election among the traveling salesmen (as petitioned for) the Board noted:

> We have carefully reviewed the entire record and also have taken official notice of our own proceedings, which show that over a period of years District 65 has appeared and been recognized as a labor organization in proceedings before this Board, including such an appearance as recently as 1970, quite independently of NAWCAS. We find that Petitioner is an existing separate labor organization and conclude that it is Petitioner's willingness itself to function as a bargaining agent which is the controlling factor in these circumstances. We shall therefore direct an election upon District 65's petition. However, if Petitioner is certified and refuses to maintain an independent course in representing unit employees, or if in bargaining the Employer has grounds for believing that District 65 is acting as an agent for another organization, the Board, pursuant to its authority to police its certifications, may examine Petitioner's conduct when the Board's established procedures are appropriately invoked for such purpose. Appendix at pages 35a, 36a.

Pursuant to the Board's direction, a secret ballot election was held and, a majority of the employees in the unit voted for the union. Accordingly, the Board issued its Certification of Representation to District 65 on January 26, 1971.

Following its certification, District 65 made a demand upon the Employer to bargain with it which the company refused. On March 11, 1971, District 65 filed an unfair labor practice charge with the Board and, on April 1, 1971, the Board's Regional Director issued a complaint alleging

that the company's refusal to bargain with District 65 violated Section 8(a)(5) of the National Labor Relations Act.

In its answer to the complaint, the company admitted its refusal to bargain, but contended that the Board's decision in the underlying representation case—that District 65 was a labor organization and was not disqualified from acting as a collective bargaining agent—was erroneous.

Counsel for the General Counsel promptly moved for summary judgment. On July 9, 1971, the Board rendered its Decision and Order finding a violation of Section 8(a)(5) of the Act and granted the motion. It directed the company to bargain with District 65 and to cease and desist from interfering with the exercise of its employees' rights under Section 7 of the Act. Appendix at page 9a.

Thereafter the company filed its Petition to Review and set aside the Order of the Board in the Court of Appeals for the Seventh Circuit, pursuant to Section 10(f) of the Act. The petition named *only* the Board as Respondent. Appendix at page 7a.

The Board then cross-petitioned for enforcement of its Order. Appendix at page 43a. The Union did not seek intervention, at that time, in the enforcement and review proceedings because its private rights were being completely protected by the Board's petition and would have merely duplicated the Board's effort.

On September 21, 1972, the Seventh Circuit rendered a *per curiam* decision, granting the company's petition to

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review, setting aside the Board's order and denied enforcement of the Board's order. Appendix at page 1a. The Court held, *inter alia*, that:

> • • • the continued close relationship (of NAWCAS and District 65) *in and of itself* creates the danger that District 65 "*may bargain*, not for the benefit of unit employees, but for the protection and enhancement of NAWCAS. We conclude that the same conflict of interest which disqualified NAWCAS in *Bambury* also disqualifies District 65, which owes loyalties both to NAWCAS and to the employees in the bargaining unit. Slip op. page 5, Appendix at page 6a. [Emphasis added]

After conferring with representatives of the General Counsel of the National Labor Relations Board, counsel for the petitioner herein was adviced that the Board would neither petition the Court for rehearing nor petition for certiorari, principally because there were no substantial public rights at stake.

Having no other alternative in order to protect its rights the petitioner Union then moved to intervene before the Seventh Circuit with leave to file its petition for rehearing. Appendix at pages 21a and 24a. The motion to intervene set forth the following grounds for intervention:

(1) At this point in the litigation the Union's interest in the case can be represented *only* by the Union. It was the Union's contract, the Union's bargaining status and the Union's members that are jeopardized by the Employer's refusal to bargain in good faith. It was noted that a compelling reason for intervention was the standing the Union would thereby acquire to seek certiorari from the adverse

Court decision, particularly since the Board has declined to seek certiorari. Appendix at pages 22a, 23a.

(2) The Union has been the real party in interest at all times with substantial legal and equitable claims at stake. The Board has been a nominal party. Appendix at page 22a.

The petition for rehearing set forth the following as reasons why it should have been granted:

(1) The Court applied an improper standard of judicial review by substituting its judgment for the Board's in an area committed by law to agency discretion. Appendix at page 25a.

(2) The Board's judgment that District 65's relationship with NAWCAS does *not* present a clear and present danger to the interests of the employees on whose behalf it seeks bargaining rights should not be disturbed unless such a finding is arbitrary and capricious. Appendix at page 26a.

(3) The Court's reliance on the "formal affiliation agreement" between NAWCAS and District 65 was misplaced. NAWCAS officers *do not* control District 65; NAWCAS *does not* retain the ultimate authority to make decisions in collective bargaining, as erroneously decided by the Court. Appendix at pages 28a, 29a.

(4) The record in this case is *absolutely* clear that only District 65 has responsibility for collective bargaining on behalf of its members, irrespective of what other associa-

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tions the members might belong to. Under no circumstances could NAWCAS veto any decision made by District 65 and the salesmen it represents. Appendix at page 29a.

(5) The Court's reliance on the *Bambury* case was also misplaced. In *Bambury,* only NAWCAS was disqualified, not District 65. To disqualify District 65 because of its association with NAWCAS is tantamount to a prior restraint on the rights of the salesmen-members of District 65. Appendix at page 31a.

(6) The Court's decision, if permitted to stand, will destroy District 65's right to organize wholesale apparel salesmen because the Union would forever carry the "taint" of NAWCAS with it. Appendix at pages 31a, 32a.

The company filed a memorandum in opposition to the motion to intervene and the petition for a rehearing. Appendix at page 46a. Basically, the company's position was that the Union waived its right to intervene because it chose not to intervene when the matter "was first presented to the Court." Appendix at page 47a. The Board did not oppose the motion to intervene or the petition for rehearing.

On October 27, 1972 the Seventh Circuit rendered its order denying both the motion to intervene and the petition for rehearing. Appendix at page 8a. That order, and the earlier *per curiam* decision of the Court setting aside the Board's order, is now under review by this Court.

Reasons for Granting the Writ

The Court should grant certiorari in this case because:

(1) The Seventh Circuit's decision denying intervention after the Court had set aside the Board's order conflicts with this Court's decision in *UAW* v. *Fafnir Bearing, supra.* Once the Board abandoned the case and decided not "to represent the Union" any longer, the Union became entitled, as "the real party of interest," to seek review of the Court of Appeals decision.

(2) The Court applied an improper standard of judicial review by substituting its judgment for the Board's in an area committed by law to agency discretion. Its decision in setting aside an order of the National Labor Relations Board is in conflict with decisions of this Court, as well as other decisions in the Seventh Circuit.

The Court should have permitted the Union to intervene after it set aside the Board's order. Once the Board decided not to pursue the matter the Union's right to intervene became timely.

This Court, in *UAW* v. *Fafnir Bearing, supra,* construed 28 U.S.C. 1254(1) to mean that a union is a "party" within the meaning of that section for purposes of appellate review after the NLRB renders a decision and order in that union's favor. Prior to *Fafnir,* 28 U.S.C. 1254(1) was interpreted by several Circuit Courts as *not* conferring that right.

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28 U.S.C. 1254(1) again comes into question in the instant case. Since *Fafnir,* the language of the section has remained the same; the *right* to intervene in appellate court proceedings of this nature is conferred strictly by case law and not by clear legislative language. Thus, the time limitations for review, contained in §10(f) of the National Labor Relations Act, which was not designed for a charging party's intervention, is still invoked against the charging party when it attempts to exercise its *judicially* granted right of intervention.

It is manifest that the refusal to permit the union to intervene after the Labor Board has abandoned its pursuit of the protection of public rights is grossly unfair. There are very real private rights at stake in this case that deserve review by this Court. Basically, the right involved is that recognized in Section 7 of the National Labor Relations Act, the right to bargain collectively with an employer. While it may be said that the Union's statutory right initially became impressed with public policy considerations, enabling the Board to recognize and enforce it, that right or interest remained as an object of parochial union concern. The Union's interest has both public and private connotations; the latter requires intervention in the appellate court proceedings, especially after the Board has decided not to pursue the public interest.

Furthermore, the Union's right to petition the Circuit Court for a rehearing should not be conditional upon its intervention in the first instance. The Union was always the real party in interest, both before the Board and before the Court. To require *all* unions to intervene, in the first instance, at the appellate court level, will, in our opinion,

cause the addition of unnecessary parties, since, in most cases, the union's interest and the Board's interest are identical. Moreover, it tends to favor form over substance.

Finally, even if a charging party's right to intervene is *originally* limited to the time when the enforcement proceedings are commenced, we submit that the *right* to intervene was revived after the Board abandoned the case. Thus, while the Board was in the case protecting the Union's interests, there was, in effect, a tolling of the statute of limitations. The statute did not begin to run against the Union's right to intervene until after the Board notified the Union of its desire not to proceed with this case (or approximately one week before the filing of the motion to intervene and petition for rehearing). See *International Union of Mine Workers* v. *Eagle-Picher Mining & Smelting*, 325 U.S. 335.

Furthermore, the Board has advised the petitioner that it will oppose this petition, notwithstanding the fact that it believes the Seventh Circuit made an incorrect decision below. Unfortunately, the Solicitor General of the United States apparently believes that he must oppose any petition for certiorari that he himself would not initiate. We believe this creates an unhappy and unfair state of events. The Board, which is charged with the responsibility both of protecting the rights of workers and effectuating the purposes of the Act, is in effect, our opponent when we seek to achieve those same ends. Fortunately, however, this Court, rather than the Board, is invested with the authority to review cases decided by the Courts of Appeals. *UAW* v. *Scofield & Fafnir*, 382 U.S. at 222. See also, *Steelworkers* v. *Labor Board*, 373 U.S. 908.

The Court applied an improper standard of judicial review by substituting its judgment for the Board's in an area committed by law to agency discretion.

A. The Judicial Review Standard

The standards long recognized and applied by the Courts (especially the Seventh Circuit) in reviewing Board determinations are set forth in *NLRB* v. *Krieger-Ragsdale & Co.*, 379 F.2d 517, 520 (7th Cir. 1967), cert. denied, 389 U.S. 1041.

> The function of the substantial evidence rule in Board determinations is to examine the adequacy of the facts as found, not to test the judgment upon them. In the instant case, the substantial evidence standard does not have controlling application, for there is no actual contest over basic facts. The controversy relates essentially to judgment on the facts. Our function, therefore, is to review the Board's exercise of discretion and determine whether the Board's determinations were reasonable, as applied to the facts.

Or, as this Court stated in *May Department Stores Co.* v. *NLRB*, 326 U.S. 376, 380 (1945):

> The judicial review afforded is not for the purpose of weighing the evidence upon which the Board acted and perhaps to overrule the exercise of its discretion, but to "guarantee against arbitrary action by the Board."

The decision of the Seventh Circuit is in conflict with these principles. The Board had determined *on the basis of the record,* that District 65's relationship with NAWCAS

does *not* present a clear and present danger to the interests of the employees on whose behalf it seeks bargaining rights. That finding should not have been disturbed unless it was arbitrary and capricious.

It was not the Seventh Circuit's function to substitute its judgment on a given state of facts for that of the National Labor Relations Board, which is charged, under the mandate of the Administrative Procedures Act, to exercise its unique expertise in labor matters and making findings of fact and law.

The Seventh Circuit's sole function was to hear arguments, read the record and the briefs and determine, thereupon, whether the NLRB's Decision and Order was supported by substantial evidence. It was no part of the Court's business to become involved in a *de novo* evaluation of the merits of the case.

B. The Record Relied on by the Board

The record *in this case* makes the fact absolutely clear that *only* District 65 has responsibility for collective bargaining on behalf of its members, irrespective of what other organizations such members might belong. Under no circumstances would NAWCAS veto any decision made by District 65 and the salesmen it represents. Appendix at page 29a.

The Court's conclusion that District 65 "*may* bargain, not for the benefit of the unit employees, but for the protection and enhancement of NAWCAS" was sheer speculation and should not be permitted to stand. As the Board

pointed out in its brief to the Court of Appeals such allegations are "conjectural and too premature to warrant consideration." Board brief, p. 17.

Moreover, the Board has stated clearly, both in its direction of election in the instant case and in its brief to the Seventh Circuit (Board brief, p. 18):

> * * * if [District 65] is certified and refuses to maintain an independent course in representing unit employees, or if in bargaining the [Company] has grounds for believing that District 65 is acting as an agent for another organization, the Board, pursuant to its authority to police its certifications, may examine [District 65's] conduct when the Board's established procedures are appropriately invoked for such purposes. Appendix at p. 36a.

The Board distinguished those cases where the petitioning organization was disqualified because they involved unions that were conceived, organized and governed by officers of an existing, disqualified union for the sole apparent purpose of obtaining bargaining rights for the latter. The Board stated to the Seventh Circuit:

> The facts here are clearly distinguishable. As previously shown, District 65 is a long-established labor organization fully capable of independently representing the Company's employees. It obtained authorization cards, requested recognition and filed a petition in its own name. And it indicated that it alone will represent the unit employees. In similar circumstances, the Board has consistently refused to deny the processes to the petitioning union. Board brief, p. 16.

The effect of this erroneous decision is devastating to the petitioner. While the Board and the Seventh Circuit would tend to treat this case as a garden-variety, run-of-the-mill enforcement case, the net effect is to deny the Congressionally declared *right* of collective bargaining to thousands of salesmen throughout the country.

The Seventh Circuit's decision, if permitted to stand, would represent the first reported decision of an existing, legitimate union being denied access to the Board's processes merely because of its association with another group. Thus, not only does the decision violate the Union's statutory rights, but also imposes a prior restraint upon the Union and its members, thereby violating constitutionally protected rights as well.

Conclusion

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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